No. 22,416

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

JAYCOX SANITARY SERVICE OF GARDEN GROVE, INC.,
and
JAYCOX SANITARY SERVICE OF ANAHEIM, INC.,

Respondent.

On Petition for Enforcement of an Order of the
National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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On Petition for Enforcement of an Order of the
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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*) [1] for enforcement of its order issued against repondent on

[1] The pertinent provisions of the Act are set forth in the Appendix to this brief.

October 27, 1966. The Board's decision and order (R. 22-38, 44-49)[2] are reported at 161 NLRB No. 34. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred in Anaheim, California, where respondent is engaged in the business of trash and garbage collection and disposal under contracts with certain municipailities.[3]

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that respondent violated Section 8(a) (5) and (1) of the Act by refusing to recognize and bargain with the Union[4] which represented a majority of its employees in an appropriate unit and by changing the wages and working conditions of these employees without notifying and bargaining with the Union. The Board also found that respondent violated Section 8(a) (3) and (1) of the Act by rescinding all bonuses

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[2] References designated "R." are to Volume I of the record as reproduced pursuant to Rule 10 of this Court. References designated "Tr." are to the reporter's transcript of testimony as reproduced in Volume II of the record. References designated "GCX" and "RX" are to the General Counsel's and respondent's exhibits, respectively. Whenever in a series of references a semicolon appears, those preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

[3] For the purposes of the Act, respondent is a single employer consisting of two integrated corporations — Jaycox Sanitary Service of Garden Grove, Inc. and Jaycox Sanitary Service of Anaheim, Inc. The corporations have common ownership and management, offices, yard facilities, and trucking equipment. (R. 11-12, 17-18, 23; Tr. 880) No jurisdictional issue is presented.

[4] Package & General Utility Drivers, Local Union No. 396, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

and vacations which striking employees had earned prior to an unfair labor practice strike, by requiring strikers to revoke their union membership as a condition of reinstatement, and by refusing to reinstate a striker to his former position upon an unconditional application to return to work. Further, the Board found that respondent violated Section 8(a) (1) of the Act by threatening employees with loss of their jobs if they continued to support the Union and by unlawfully interrogating employees about their union affiliation, activities, and sympathies. The following are the facts upon which these findings are based.

A. The employees strike and designate the Union as their collective bargaining representative

On the morning of April 5, 1965,[5] approximately 65 drivers and swampers (assistants to the drivers) arrived at respondent's yard[6] and discussed among themselves their dissatisfaction with the then current wage rates and their concern over a rumor concerning route changes (R. 24; Tr. 273-274, 277, 330, 345-346, 566, 586, 985). Thereafter, the employees asked General Foreman Guerena and Manager Raul Rangel for a raise of $15 a week and for a commitment that there would be no increase in the number of stops on the various routes (R. 24; Tr. 277, 330-331). Rangel offered the men an immediate increase of $5 a week, which the employees rejected (R. 24; Tr. 279).

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[5] Unless otherwise indicated, all the events herein occurred during 1965.

[6] Respondent employs approximately 70-75 drivers and swampers and concedes that a unit of such employees is appropriate (R. 24; Tr. 987-988, 1256-1257).

Rangel then told the men either to accept the raise and go to work or to leave the yard (R. 24; Tr. 331). The employees chose to leave but waited outside the gate for Warren Jaycox, respondent's owner (R. 24; Tr. 331). When he arrived, Jaycox listened to the men and Guerena instructed them to select one spokesman for the Garden Grove area and another for the Anaheim area (R. 24; Tr. 333). The employees picked John Nieto and Joe "Blackie" Diaz to confer with Jaycox (R. 24; Tr. 575-576). In his office, Jaycox told these spokesmen that he would grant the employees an immediate increase of $5 a week and promised that, after adjusting the routes in two weeks or a month, he would give the employees an additional $10 a week (R. 25; Tr. 609, 1100, 1171-1172). When this offer was repeated to the employees assembled outside the gate they rejected it (R. 25; Tr. 574, 610-611, 1170, 1172, 1196).

The employees then decided that they needed a union to represent them and that they should go to the Teamsters Hall in Orange (R. 25; Tr. 334-335). The 64-66 employees thereupon got into their cars and drove there (R. 25; Tr. 37a, 335, 345-347, 767). At the hall, the men spoke to representatives of Teamsters Local 235 who informed them that Local 396 in Los Angeles had jurisdiction over trash truckdrivers (R. 25; Tr. 53, 61, 517). When asked if they wanted that local, the Union herein, to represent them, the employees unanimously answered in the affirmative (R. 25; Tr. 104). Thereafter, 64 employees signed cards designating the Union as their collective bargaining representative (R. 25; Tr. 164, 767).[7]

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[7] Although the cards were those normally used by Local 235, the employees signing cards were told and understood that they were designating Local 396 (R. 25; Tr. 81-82, 105-106, 335-337).

While the employees were filling out their cards, Kelly Drake, a representative of Local 235, telephoned to Los Angeles and told John Drobish, the president of the Union, that respondent's employees were at the Teamsters Hall in Orange and that they wanted the Union to represent them (R. 25; Tr. 38, 158). Drake asked Drobish to come and address the employees (R. 25; Tr. 39, 158). Drobish agreed to leave for Orange immediately (R. 25; Tr. 158). Before departing from Los Angeles, Drobish telephoned Jaycox and told him that the Union represented his employees (R. 26; Tr. 158-159). Jaycox turned the phone over to Adam Schleining, an employer engaged in the trash collection business who had a contract with the Union (R. 26; Tr. 159, 673, 676-677). When Schleining took the phone from Jaycox, he asked Drobish to visit respondent's office to discuss the situation (R. 26; Tr. 159-160).

Drake also called Jaycox, informed him that the employees were at the Teamsters Hall, and asked if Jaycox wanted the men to return to work (R. 25; Tr. 57-58, 886). Jaycox told Drake that he did (R. 25; Tr. 58). Drake then returned to the meeting, collected the cards, and told the men that the Union's president would speak to them shortly and that Jaycox wanted them to go back to work (R. 25; Tr. 81). The employees agreed to return to their jobs (R. 25; Tr. 81, 351-352, 520). The men and two Teamsters representatives, Robinson and Brown, went to respondent's yard where the representatives requested Jaycox to put the men to work as he had said he would do (R. 25-26; Tr. 123-125, 142-143). Jaycox replied that it was quite late and he doubted that respondent would make any collections of trash that day (R. 26; Tr. 143). Brown told Jaycox that the employees had signed up with the Union and that a representative of the Union would arrive at respondent's office presently (R. 26; Tr. 143). When Brown asked Jaycox if he would deal with the Union, Jaycox rejoined that he did

not know what he would do and that he would check with his associates in the trash business before taking any action (R. 26; Tr. 143). Jaycox also stated that some of these associates were now on the way to his office and that he thought he would call a meeting to discuss the matter with his employees (R. 26; Tr. 144). Brown cautioned him that if he conducted such a meeting without a representative of the Union present, it might result in the filing of unfair labor practice charges with the Board (R. 26; Tr. 144).

B. Respondent refuses to recognize the Union and attempts to break the strike and undermine the Union's support

After Drobish arrived at respondent's yard, he instructed the employees to return to the Teamsters Hall while he talked with Jaycox (R. 26; Tr. 160-161, 264). In respondent's office, Drobish met Jaycox and Schleining, who was assisting Jaycox in his dealings with the Union (R. 26; Tr. 161). After a brief discussion, Schleining told Drobish that Jaycox was not yet ready to talk about anything and that Drobish should come back that afternoon (R. 26; Tr. 161).

At the Teamsters Hall, Drobish accepted the 64 cards, which had been signed, and addressed the 66 employees present, telling them, *inter alia*, that he had a two o' clock appointment with Jaycox that afternoon (R. 26-27; Tr. 83, 163-166, 846). He asked the employees to return to the hall about 3:30 p.m. for a report on that meeting (R. 27; Tr. 166).

When Drobish entered respondent's office at the scheduled time, the receptionist told him that Jaycox was in a conference and could not see him (R. 27; Tr. 166-167, 221-222). In response to Drobish's request that someone come out and speak to him, Schleining appeared and told him that they were having a meeting of "the Association"[8] and that Jaycox was not ready to discuss anything at that point (R. 27; Tr. 167, 222). Schleining told Drobish: "[W]e will contact you later." (R. 27; Tr. 167, 222).

Drobish returned to the Teamsters Hall in Orange where he again met with the employees (R. 27; Tr. 168). He told them that Jaycox had determined not to see him and instructed the employees to report to respondent's yard at their regular time the following morning (R. 27; Tr. 169-171). He also instructed them to begin picketing if respondent attempted to make collections using other workers (R. 27; Tr. 171).

On the next day, April 6, and thereafter, respondent operated its business with men furnished by members of the Association (R. 28; Tr. 790-794, 1247-1248). As a result, respondent's employees began picketing on April 6, bearing signs which read: "JAYCOX UNFAIR TO TEAMSTERS LOCAL 396" (R. 28; Tr. 781). This picketing continued until the afternoon of April 14, when all but four or five employees had returned to work (R. 28; Tr. 194, 564, 781).

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8 The Orange County Rubbish Disposal Association, a group of owner-operators in the trash collection and disposal business in Orange County, California, which will be referred to herein as the Association.

On Wednesday, April 7, Jaycox asked Schleining to arrange a meeting with the Union (R. 28; Tr. 696). Pursuant to this request, Schleining spoke with Union Representative Raasch, who had charge of the picket line, and the two agreed that Jaycox and representatives of the Union would meet at Schleining's office on Friday afternoon (R. 28; Tr. 697). Later, Jaycox told Schleining that the other members of the Association had learned of the scheduled meeting and that he wanted to call it off so as not to antagonize the members of the Association who were lending him men and equipment (R. 29; Tr. 698). Schleining telephoned Raasch and rescheduled the meeting for Saturday at the Union's office in Los Angeles (R. 29; Tr. 174, 698-699).

On Thursday, April 8, Manager Raul Rangel told the picketing employees that Jaycox wanted them to return to work and was willing to give them the $15 increase in their weekly wages which they had requested on April 5 (R. 28; Tr. 303). He promised an immediate increase of $5 and that after a month Jaycox would grant an additional $10 (R. 28; Tr. 303). The following day was payday and the strikers went into respondent's office to collect their checks (R. 28; Tr. 613-614). When employees Nieto and Diaz appeared in the office, another employer, Taormina of Anaheim Disposal Co., called them over (R. 28; Tr. 614). He asked them what the Union was doing for them and whether its effort were proving successful (R. 28; Tr. 614). Taormina then asked: "[W]hy don't you have a talk with Jaycox, get something straightened out?" (R. 28; Tr. 614). At that point, General Manager Rangel entered the office and Taormina told him that Nieto and Diaz wanted to meet with Jaycox (R. 28; Tr. 614-615). Rangel replied that this could be arranged and Taorimina suggested that they meet at the Wonder Bowl, a bowling alley near the office (R. 28-29; Tr. 615).

~~On April 9, employees Diaz, Nieto, Salazar, Bill, and Palma met at the Wonder Bowl with Jaycox, Rangel, Robert Faust~~

On April 9, employees Diaz, Nieto, Salazar, Bill, and Palma met at the Wonder Bowl with Jaycox, Rangel, Robert Faust (an attorney for Jaycox), Taormina, and Trulis of Garden Grove Disposal Co. (R. 29; Tr. 527-529, 616-618). Jaycox offered the men an immediate raise of $5 a week and promised that their full pay demands would be satisfied in the immediate future (R. 29; Tr. 532, 619). The employees told Jaycox that all the men had signed cards at the Teamsters Hall and Jaycox asked them if they knew what they had signed (R. 29; Tr. 621, 1146). Several employer-representatives expressed interest in the cards and one asked if they would "hold up in court" (R. 29; Tr. 533, 621-622, 1108-1109). Faust asked the employees to procure a card for him so that he could determine if it was "worth anything" (R. 29; Tr. 534-535, 1146-1147). An employee told Jaycox that the Union had informed the strikers that Drobish had a meeting with Jaycox arranged for that Saturday (R. 29; Tr. 535). Jaycox asserted that he had never received a call from the Union and had never been asked to confer with it (R. 29; Tr. 535, 622-623). To support his denial that there was a meeting scheduled for Saturday, Jaycox said he would be at respondent's yard at the time of the supposed conference with the Union and would address the assembled pickets (R. 29; Tr. 535-536, 1113).

On Saturday, April 10, when Schleining arrived at respondent's office to go with Jaycox to Los Angeles to meet with the Union, Jaycox told him that the meeting was postponed because members of the Association had learned of it and they were supplying him with workers (R. 29; Tr. 176, 700-702). Schleining then reported to Union Representative Raasch that there would be no meeting that day (R. 29; Tr. 176, 701). Jaycox also told Schleining that he could see no advantage in meeting with the Union because "we have the situation pretty well under control" (R. 29; Tr. 702). Accordingly, Schleining made no further attempts to arrange a meeting between Jaycox and the Union (R. 29; Tr. 701, 707).

At the time of his appointment with the Union on April 10, Jaycox, accompanied by three other disposal company operators in the area, walked out to the men on the picket line (R. 29; Tr. 550, 612-613, 629-630, 805-810, 1113). He told the assembled employees that he would grant them a $5 weekly increase immediately and another $10 increase as soon as the routes were adjusted and that the employees could come back to work on Monday (R. 29-30; Tr. 631, 810, 963-964, 1152). Raasch countered this move by telling the pickets that there would be a union meeting the next day (R. 30; Tr. 811, 967).

The following morning, approximately 50 to 55 employees attended a meeting at the Teamsters Hall (R. 30; Tr. 206-207, 814-815, 968). The employees voted to continue picketing for another week and assisted in making out a schedule for picket assignments (R. 30; Tr. 207-210, 813-814). However, many employees expressed doubts about their ability to withstand financially another week of striking (R. 30; Tr. 588). That evening, employees Guevara and Diaz were at the latter's home when Fonseca one of their co-workers arrived at the house (R. 30; Tr. 368-369, 414, 424). The men discussed the subject of returning to work and Fonseca proposed that they visit the employees and poll them to determine how many wanted to go back to work on the terms that Jaycox had offered (R. 30; Tr. 368-369). Guevara and Fonseca then got into the truck and went to approximately 25 employees (R. 30; Tr. 370, 419, 421). Of those questioned, about 21 said they wished to return to work (R. 30; Tr. 370, 416, 429). Thereupon, Diaz telephoned Jaycox and arranged another meeting at the Wonder Bowl for that evening (R. 30; Tr. 370-371, 422-423).

At this meeting, Jaycox put in writing his offer of a $5 weekly increase immediately and a $10 weekly increase when

the routes were adjusted (R. 30; Tr. 372, 425, 431). In Jaycox's presence, Taormina requested the employees to sign printed forms revoking their authorizations of the union as collective bargaining representative (R. 30-31; Tr. 372-374, 426-427).

The meeting concluded and Jaycox gave the group of employees $25 for gas to be used when they went to the homes of the various employees to tell them of his offer and his desire that they return to their jobs (R. 31; Tr. 375-376). On Monday morning April 12, approximately 38 employees reported for work (R. 31; Tr. 1093-1094). Rangel and Jaycox told each of the men that they had to sign the authorization revocation form before he could be reinstated (R. 31; Tr. 377-379, 433-434, 488-489, 555-556, 1044-1049, 1237-1238, GCX 3). Employees reporting for work on ensuing days also had to sign these forms (R. 31; Tr. 304, 307-309, 1158, GCX 3).

C. Respondent threatens employees with loss of their jobs if the Union should become their bargaining representative

Several weeks after the end of the strike, all the employees gathered together with General Manager Rangel and Foremen Vargas, Dominguez and Guerena (R. 31; Tr. 381-382, 635-636, 930-932). Guerena told the employees that he knew they still wanted the Union to represent them and that Jaycox had said that, if they wanted the Union, they could have it but they were going to lose money by such a move and would hurt themselves (R. 31; Tr. 382). Guerena reported that Jaycox had told him that, if the Union became the employees' bargaining agent and the Company signed a contract with it, respondent would have to require that all employees, especially drivers, speak and write English and that those who could not

do so would be discharged (R. 31; Tr. 382-383, 559, 929-930). Guerena said that all drivers would have to speak and write English because sometimes people from whom they collected trash talked to them about special work (R. 31; Tr. 382-383, 637-638). Guerena also said that, if the employees wanted the Union, they should look for other jobs for respondent would have to hire men who spoke English (R. 31; Tr. 383). Guerena displayed several union cards, said that he had had experience with unions, that they had never helped him, and that anyone who joined a union was throwing his money away (R. 31; Tr. 560, 636-637, 930).

D. Respondent rescinds the bonuses and vacations employees had earned prior to the strike and unilaterally changes the routes and wages of the returned strikers

At a second meeting of the employees after the strike, Jaycox addressed those present and stated that all who had returned to work must start as new employees (R. 32; Tr. 323, 383-386, 560, 639, 932-934). He said that because he had lost so much money during the strike, he would not be able to pay the bonuses and vacation pay which the men had earned before the strike and that he was cancelling them (R. 32; Tr. 323, 384-388, 932-934, 1233-1234).

After the strikers returned to work, respondent paid the drivers $90 a week and the swampers $80 a week (R. 32; Tr. 956). Before the strike, their wages had been $85 a week and $75 a week, respectively (R. 32; Tr. 956). On May 10, respondent adjusted the routes and, thereafter, the drivers' pay was raised to $100 a week and the swampers' pay to $90 a week (R. 32; Tr. 956). These changes in routes and wages were effected without notifying or bargaining with the Union (R. 32; Tr. 642-644, 1159).

E. Respondent refuses to reinstate Paul Infante

At the time of the strike, Infante had worked for respondent for approximately six years (R. 32; Tr. 712). He had "a regular route" with a "truck assigned to him" for over a year prior to the strike (R. 32; Tr. 747-748).[9] April 5, he joined with the other employees, signed a card, and picketed (R. 32; Tr. 713-714).

When his fellow employees returned to work during the week of April 12 Infante decided that he would not go back (R. 32; Tr. 727, 729, 735-736, 744). As he testified: "It just did not occur to me to go back right there and then" (R. 32; Tr. 727).

On April 29, Infante sought reinstatement (R. 33; Tr. 720-722, 748-749). He spoke to his foreman and asked to be returned to work (R. 33; Tr. 740, 748-749). The foreman told him that there were no openings then (R. 33; Tr. 724, 748).

II. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board found that respondent violated Section 8(a) (5) and (1) of the Act by refusing to recognize and bargain with the Union and by changing the wages

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[9]Among respondent's employees, there are regular drivers and swampers, *i.e.*, those employees who compose a crew and work the same truck on the same route (R. 33; Tr. 380, 389, 762, 900, 1138-1139). There are also men who are required on certain days as replacements (R. 33; Tr. 389, 1138-1139).

and working conditions of its employees without notifying and bargaining with the Union. The Board also found that respondent violated Section 8(a) (3) and (1) of the Act by rescinding all bonuses and vacations that striking employees had earned prior to the unfair labor practice strike, by requiring strikers to revoke their authorizations of the Union as a condition of reinstatement, and by refusing to reinstate a striker to his former position upon an unconditional application to return to work. Further, the Board found that respondent violated Section 8(a) (1) of the Act by threatening employees with loss of their jobs if they continued to support the Union and by interrogating employees about their union sympathies and activities (R. 33-37, 44-46).

The Board ordered respondent to cease and desist from the unfair labor practices found and from in any other manner interfering with restraining or coercing its employees in the exercise of their statutory rights. Affirmatively, the order requires respondent to bargain with the Union on request and to incorporate any understanding reached in a signed agreement and to reinstate Paul Infante with backpay. The order also requires respondent to reinstitue the systems of bonuses and vacation pay established before the strike and to make employees whole for any financial loss suffered as a result of respondent's discriminatory discontinuance of such systems. In addition, respondent must post appropriate notices (R. 37-38, 46-49).

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDINGS THAT RESPONDENT VIOLATED SECTION 8(a) (5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION AND BY CHANGING WAGES AND WORKING CONDITIONS OF THE EMPLOYEES WITHOUT NOTIFYING AND BARGAINING WITH THE UNION

Section 8(a) (5) of the Act requires an employer "to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)." This latter section provides that "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exlusive representatives of all employees in such unit for the purposes of collective bargaining. * * *" Thus, where a union has obtained authorization cards signed by a majority of the employees in an appropriate unit, designating the union as their bargaining representative, an employer violates Section 8(a) (5) of the Act if, absent a good-faith doubt of the union's majority status he refuses a request to recognize and bargain with the Union, in order to gain time within which to undermine the union's majority support. *N.L.R.B. v. Security Plating Company,* 356 F. 2d 725, 726-727 (C.A. 9); *Master Transmission Rebuilding Corp. v. N.L.R.B.* 373, F. 2d 402 (C.A. 9), enforcing 155 NLRB 364, 367-369; *Snow v. N.L.R.B.,* 308 F. 2d 687, 691 (C.A. 9); *N.L.R.B. v. Scott & Scott,* 245 F. 2d 926, 928 (C.A. 9); *N.L.R.B. v. Parma Water Lifter Co.,* 211 F. 2d 258, 263 (C.A. 9), cert. denied, 348 U.S. 829; *N.L.R.B. v. Geigy,* 211 F. 2d 553, 556 (C.A. 9), cert denied, 348 U.S. 821.

The record here shows that on April 5, the date the Union requested recognition as bargaining agent, it represented 64 of the approximately 70-75 employees in the unit sought (R. 33; Tr. 167, 767, 1256-1257). When the Union made its request, respondent did not question the Union's majority or the appropriateness of the unit but, as shown above pp. 6-12, delayed recognition and bargaining while it undertook to defeat the Union. We submit that respondent's unlawful course of conduct demonstrates beyond question its lack of good faith doubt of the Union's majority status and, therefore, that the Board's finding that respondent violated Section 8(a) (5) and (1) of the Act by refusing to recognize and bargain with the Union is entitled to affirmance. See cases cited *supra.*

Moreover, since the Union was the designated representative of the unit employees, respondent was under a duty to deal exclusively with the Union regarding the wages and conditions of employment of those employees. *Medo Photo Supply Corp. v. N.L.R.B.*, 321 U.S. 678, 683-684. By changing wages and working conditions without notifying and bargaining with the Union, respondent derogated its bargaining obligation and further violated Section 8 (a) (5) and (1) of the Act. *N.L.R.B. v. Katz*, 369 U.S. 736, 743 and 568, 572 (C.A. 9); *N.L.R.B. v. Yutana Barge Lines, Inc.*, 315 F. 2d 524, 529-530 (C.A. 9); *Carpinteria Lemon Association v. N.L.R.B.*, 240 F. 2d 554, 557 (C.A. 9), cert. denied, 354 U.S. 909.

II. SUBSTANTIAL EVIDENCE ON THE ~~BOARD~~ Record AS A WHOLE SUPPORTS THE BOARD'S FINDINGS THAT RESPONDENT VIOLATED SECTION 8(a) (3) AND (1) OF THE ACT BY CONDITIONING REINSTATEMENT OF STRIKING EMPLOYEES UPON THEIR ABANDONMENT OF THE UNION AND BY REFUSING TO PAY ESTABLISHED BONUSES AND VACATION PAY TO THOSE EMPLOYEES

Section 8(a) (1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7," which includes the right to strike.[10] Section 8(a) (3) makes it unlawful for an employer "by discrimination in regard to hire or tenure of employment or any term of condition of employment to * * * discourage membership in any labor organization," which includes discouraging participation in concerted activities.[11]

Respondent's insistence that the striking employees abandon the Union as a condition of their reinstatement is a notoriously flagrant unfair labor practice. The illegality under the Act of imposing any such condition was clearly established in *N.L.R.B. v. Mackay Radio & Telephone Co.*, 304 U.S.333, 346-347, and

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[10] The act's solicitude for the right to strike is further shown by Section 13, which provides that: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike * * *."

[11] *National Labor Relations Board v. Erie Resistor Corp.*, 373 U.S. 221; *Radio Officers' v. N.L.R.B.*, 347 U.S. 17, 39-40.

is not open to challenge. Accordingly, the Board was justified in finding that such action constituted a violation of Section 8(a) (3) and (1) of the Act.

It is also well established that an employer violates these statutory provisions by denying vacation or bonus benefits to employees because they went on strike. *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26; *N.L.R.B. v Wheeling Pipe Line, 229 F. 2d 391, 394-395 (C.A. 8).* As shown above p. 12, respondent treated all returning strikers as new employees and denied them bonuses and vacation pay which they had earned prior to the strike.

The record readily supports the inference that respondent changed these terms and conditions of the strikers' employment to retaliate against them for engaging in a protected concerted activity. However, no proof of illegal motivation need be shown in a case like this where on its face, employer conduct is inherently discriminatory and destructive of employee rights. *N.L.R.B., v. Great Dane Trailers, Inc.*, 388 U.S. 26; 33-34; *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221, 228-231. The cancellation of bonuses and vacation pay already accrued to the strikers carried its own indicia of illegality. Respondent merely asserted that economic losses resulting from the strike motivated such cancellation, but it did not sustain its burden of proving sufficient justification for its patently discriminatory conduct. *Great Dane Trailers, supra*, 388 U.S. at 34. Accordingly, the Board was warranted in finding that respondent violated Section 8(a) (3) and (1) of the Act by denying returning strikers their bonuses and vacation pay.

III. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT RESPONDENT VIOLATED SECTION 8(a) (1) OF THE ACT BY THREATENING AND INTERROGATING ITS EMPLOYEES

As shown in the Statement (pp. 11-12), respondent threatened its employees, many of whom did not speak or write English (R. 31; Tr. 559, 929), that, if the Union became their bargaining agent, employees, especially the drivers, would have to speak and write English (R. 31; Tr. 382-383, 559, 929-930). Thus, it warned the employees that, if they wanted union representation, they should look for other jobs because respondent would be required to hire men who knew English (R. 31; Tr. 383). Such open threats of reprisal are clearly violative of Section 8(a) (1) of the Act. *N.L.R.B. v. Geigy Company,* 211 F. 2d 533, 557 (C.A. 9), cert. denied, 348 U.S. 821; *N.L.R.B. v. Idaho Egg Producers, Inc.,* 229 F.2d 821, 823 (C.A. 9); *N.L.R.B. v. West Coast Casket Co.,* 205 F.2d 902, 904-905 (C.A. 9); *N.L.R.B. v. C. Britton Co.,* 352 F.2d 797, 798 (C.A. 9); *N.L.R.B. v. Ambrose Distributing Co.,* 358 F.2d 319, 320 (C.A. 9), cert. denied, 385 U.S. 838.

Likewise unlawful were respondent's interrogations on April 9 concerning the cards employees had signed at the Teamsters Hall. Employees were asked if they knew what they had signed and were asked to procure a card so that respondent's counsel could see if it was "worth anything" (R. 29; Tr. 533-535, 621-622, 1108-1109, 1146-1147). At the same meeting, respondent unilaterally offered the employees certain wage increases. Such interrogation, occuring in a context of union hostility and efforts to undermine the Union's support was violative of Section 8(a) (1) of the Act. See, for example, *N.L.R.B. v. Griggs Equip., Inc.,* 307 F. 2d 275, 277-278 (C.A. 5); *N.L.R.B. v. Monroe Feed Store,* 237 F. 2d 116 (C.A. 9), enforcing 110 NLRB 630.

IV. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT RESPONDENT VIOLATED SECTION 8(a) (3) AND (1) OF THE ACT BY REFUSING TO REINSTATE STRIKER PAUL INFANTE

Although the strike was precipitated by a wage dispute, as the Board found it was converted into an unfair labor practice strike and prolonged by respondent's subsequent illegal conduct. See *N.L.R.B. v. Giustina Bros. Lumber Co.*, 253 F. 2d 371, 374 (C.A. 9). The strikers thereupon became unfair practice strikers and respondent was obliged to reinstate them on an unconditional application, discharging, if necessary, replacements hired after it had engaged in the unfair labor practices. *Ibid.*; *Snow v. N.L.R.B.*, 308 F. 2d 687, 695 (C.A. 9). Thus, respondent's refusal to comply with Infante's request for reinstatement constituted, as the Board found (R. 34-35, 45), discrimination in violation of Section 8(a) (3) and (1) of the Act. *Mastro Plastics v. N.L.R.B.*, 350 U.S. 270, 278; *N.L.R.B. v. West Coast Casket Co., Inc.*, 205 F 2d 902, 907-908 (C.A. 9).

Respondent contends that it did not refuse to reemploy Infante, but rather that Infante applied for work after the trucks had been dispatched on the morning of April 29, and that his foreman told him nothing was available that day. However, it is clear from the record that Infante was a regular and not an extra driver working on a day-to-day basis (R. 32; Tr. 747-748). Contrary to respondent's assertions, all employees are not dispatched on a first-come basis; rather, senior employees have regular trucks and routes assigned to them and Infante was one of those employees (R. 33; Tr. 380, 389, 747-748, 762, 900, 1138-1139). It is also clear from the record that Infante applied for his old job but was told flatly

that there were no openings; nor was he offered any prospect of future employment (R. 33; Tr. 718, 720-721, 724, 748-749). The fact, however, that Infante could not be fitted into respondent's work schedule on April 29, and that there was no work for him that day, did not relieve respondent of the obligation to reemploy him in response to his request. "This basic right to jobs cannot depend on job availability as of the moment when the applications are filed. The right to reinstatement does not depend upon technicalities relating to application . . . If and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement." *N.L.R.B. v. Fleetwood Trailer Co.,* 389 U. S. 375 [redacted].

Respondent further contends that Infante chose not to return to work at the conclusion of the strike, and hence, that his application for reinstatement was untimely. The record establishes that Infante continued to picket after most of his co-workers abandoned the strike (R. 34; Tr. 734-735) and that he did not seek reinstatement until two weeks after the strike ended (R. 34; Tr. 747-748). However, unfair labor practice strikers may apply for reinstatement at any time within a reasonable period after the conclusion of a strike, and what is a reasonable period depends upon the circumstances of the case. *E.A. Laboratories, Inc.,* 86 NLRB 711, 713-714, enforced 188 F. 2d 885 (C.A. 2), cert. denied, 342 U.S. 871; *J.H. Rutter-Rex Manufacturing Company* 158 NLRB 1414, 1543; *R.J. Oil & Regining Co., Inc.,* 108 NLRB 641, 684-685; *Crosby Chemical, Inc.,* 105 NLRB 152, 154. Here, respondent induced the employees to abandon their strike through the commission of unfair labor practices and then unlawfully demanded that returning strikers revoke their union authorizations. We submit that under such circumstances Infante's unconditional request for reinstatement approximately two weeks after the other employees capitulated and abandoned the strike was not untimely.

V. NO ASPECT OF THE CASE IS MOOT AND THE BOARD'S ORDER IS IN ALL RESPECTS VALID

Before the Board, respondent contended that all aspects of this case, other than the Infante matter, were effectively resolved by the parties through the collective bargaining process and were, therefore, moot.[12] Accordingly, it urged the Board not to issue an order requiring respondent to bargain with the Union and to remedy the other unfair labor practices. The Board rejected the contention and issued an order requiring respondent to remedy all the violations of the Act.

It has long been recognized, and recently was reaffirmed in *Fibreboard Paper Products Corp. v. N.L.R.B.* 379 U. S. 203, 215-216, that the Board's remedial power is a broad discretionary one, subject only to limited judicial review. *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 346. "The relation of remedy to policy is peculiarly a matter for administrative competence . . . " *Phelps Dodge Corp. v. N.L.R.B.*, 313, U.S. 177, 194. The Board's order will not ordinarily be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. N.L.R.B.*, 319 U.S. 533, 540. We submit that no such showing has been made in this case and that the Board's order is valid and proper.

It was recognized by this Court in *Pacific Coast Association of Pulp and Paper Mfrs. v. N.L.R.B.*, 304 F. 2d 760,765

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[12] A stipulation, which was executed by attorneys for respondent and the Union and filed with the Board, relates that respondent recognized the Union and entered into a five-year contract with it, effective April 16, 1966.

that a pending unfair labor practice proceeding is not rendered moot merely because the employer and union have settled some of the issues in dispute by means of collective bargaining. In that case, as here, the employee representatives had filed the charges against the employer, but the Court, stressing the public, as opposed to private rights involved in these cases, stated, "This is a proceeding by the Board, not the Unions." See also, *Local 1976, Carpenters Union v. N.L.R.B.*, 357 U.S. 93, 97 n. 2; *McQuay-Norris Mfg. Co. v. N.L.R.B.*, 116 F.2d 748, 751 (C.A. 7), cert. denied, 313 U.S. 565. *N.L.R.B. v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 271; *N.L.R.B. v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 225, n. 7; *N.L.R.B. v. Pool Manufacturing Co.*, 339 U.S. 577, 581; *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395; 399 n. 4; *N.L.R.B. v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 567.

Under all the circumstances of this case, the Board was justified in concluding that it was desirable to add the sanctions of an order to the agreement the parties had reached, and that the various other violations of the Act, which respondent contended were rendered moot by such agreement, were not in fact remedied but warranted issuance of the instant order.

CONCLUSION

For the reasons stated, it is respectfully requested that a decree issue enforcing the Board's order in full.

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March 1968

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

Marcel Mallett-Prevost
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National Labor Relations Board

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8(a). It shall be an unfair labor practice for an employer –

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:
>
> * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * *

LIMITATIONS

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

APPENDIX B

The following table of exhibits is presented pursuant to Rule 18(2)(f) of the Rules of the Court. References are to the typewritten transcript of testimony ("Tr."):

GENERAL COUNSEL'S EXHIBITS

No.	Identified	Offered	Received
1(a) through 1(r)	7	7	7
2-1 through 2-67	42-47	51	
2-18 and 2-61			339
2-58			345
2-57, 2-60, 2-61, 2-63, 2-65			350
2-36			487
2-17 and 2-34			520
2-28			715
2-38			763
2-46			902
2-39			913
2-60			925
2-26			940
2-3 through 2-16, 2-19 through 2-27, 2-29 through 2-33, 2-35, 2-37, 2-38, 2-40 through 2-45, 2-47 through 2-55, 2-59, 2-64, 2-66, and 2-67			997
3	305	490	491

RESPONDENT'S EXHIBITS

1 and 2	1010	1010	1010
3	1014	1019-1020	1020
4 and 5	726*	1264-1265	1265

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* Respondent's Exhibits Nos. 4 and 5 were introduced as General Counsel's Exhibits Nos. 4 and 5.